No. 99-1238

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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September 11, 2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT

RESPONDENT'S INTERPRETATION OF SECTION 2244(D) NEGATES THE PLAIN LANGUAGE OF THE STATUTE AND SUBVERTS CONGRESS'S INTENT IN PASSING THE STATUTE OF LIMITATIONS 1

A. Respondent's Interpretation Negates the Plain Language of the Tolling Provision 1

B. Respondent's Interpretation Frustrates the Objectives of the Statutory Limitations Period Without Advancing Any Purpose of the Tolling Provision 8

C. The State's Rule Employs Pre-existing Habeas Doctrine, Which Provides Ample Guidance on How the Rule Is To Be Administered 12

D. Respondent's Second Post-Conviction Motion Was Procedurally Barred in State Court 16

TABLE OF AUTHORITIES

Cases

Bacchi v. Senkowski, 884 F.Supp. 724 (E.D.N.Y. 1995), *aff'd*, 100 F.3d 603 (2d Cir.), *cert. denied*, 519 U.S. 894 (1996) 13n.4

Ball v. Senkowski, 906 F. Supp. 99 (N.D.N.Y. 1995) .. 13n.4

Barefoot v. Estelle, 463 U.S. 880 (1983) 9

Bentley v. Scully, 851 F.Supp. 586 (S.D.N.Y. 1994), *vacated on other grounds*, 41 F.3d 818 (2d Cir. 1994), *cert. denied*, 516 U.S. 1152 (1996) 13n.4

Bossett v. Walker, 41 F.3d 825 (2d Cir. 1994) 13n.4

Caballero v. Keane, 42 F.3d 738 (2d Cir. 1994) 13n.4

Childs v. Zavaras, 2000 U.S. App. LEXIS 2685 (10th Cir. 2000) 11n.3

Davis v. Wainwright, 478 U.S. 1044 (1986) 6

Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999) ... 11n.3

Freeman v. Page, 208 F.3d 572 (7th Cir. 2000) 16

Gomez v. District Court, 503 U.S. 653 (1992) 9

Gray v. Netherland, 518 U.S. 152 (1996) 16

Grey v. Hoke, 933 F.2d 117 (2d Cir. 1991) 13n.4

Harris v. Reed, 489 U.S. 255 (1989) 18

Holmes v. Bartlett, 810 F.Supp. 550 (S.D.N.Y. 1993) . 13n.4

Hughes v. Irvin, 967 F.Supp. 775 (E.D.N.Y. 1997) ... 11n.3

Jackson v. Leonardo, 162 F.3d 81 (2d Cir. 1998) 13n.4

Johnson v. State of New York, 974 F.Supp. 185
(E.D.N.Y. 1997) 13n.4

Lindh v. Murphy, 521 U.S. 320 (1997) 6

Mabrey v. Keane, 939 F.Supp. 193 (E.D.N.Y. 1996) .. 13n.4

McCleskey v. Zant, 499 U.S. 467 (1991) 6, 16

Meachem v. Keane, 899 F.Supp. 1130
(S.D.N.Y. 1995) 13n.4

Meatley v. Artuz, 886 F.Supp. 1009
(E.D.N.Y. 1995) 13n.4

Moates v. Walker, 929 F.Supp. 82 (E.D.N.Y. 1996) .. 13n.4

People v. Bachert, 69 N.Y.2d 593,
516 N.Y.S.2d 623 (1987) 7n.2

Perfetto v. Hoke, 898 F.Supp. 105 (E.D.N.Y. 1995) .. 13n.4

Reyes v. Keane, 118 F.3d 136 (2d Cir.1997) 13n.4

Sawyer v. Whitley, 505 U.S. 333 (1992) 9

Smith v. Johnson, 216 F.3d 521 (5th Cir. 2000) 11n.3

Smith v. McGinniss, 208 F.3d 13 (2d Cir. 2000) 16

Smith v. Ward, 209 F.3d 383 (5th Cir. 2000) 4n.1

Strogov v. Attorney General, 191 F.3d 188 (2d Cir. 1998) 13n.4

Teague v. Lane, 489 U.S. 288 (1989) 15, 18

Washington v. James, 996 F.2d 1442 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994) 13n.4

Webster v. Moore, 199 F. 3d 1256 (11th Cir. 2000) 11n.3, 16

Weekly v. Moore, 204 F.3d 1083 (11th Cir. 2000) 11n.3

Williams v. Taylor, 120 S.Ct. 1495, 1519 (2000) 2, 18

Statutes

202.5 of the Uniform Rules for the New York State Trial Courts and the County Court cases from 1932 and 1898 5

28 U.S.C. § 2244 ..... 2, 6, 14n.5

28 U.S.C. § 2246 2

28 U.S.C. § 2254 2

28 U.S.C. § 2262 2

28 U.S.C. § 2263 2

28 U.S.C. § 2266 2

New York Criminal Procedure Law
§ 440.10 . . . . . 8, 14n.5, 17

New York Civil Practice Law
and Rules §304 5

Legislative Materials

141 Cong. Rec. S 7807 (1995) 9

141 Cong. Rec. S 7822 (1995) 9, 10

141 Cong. Rec. S 7823 (1995) 10

Other Authorities

Report of the Ad Hoc Committee on Federal Habeas
Corpus in Capital Cases, Judicial Conference
of the United States, at 5 (1989) 9-10

Victor E. Flango, *Habeas Corpus in State and*
Federal Courts, National Center for State Courts,
(1994) 11

ARGUMENT

RESPONDENT'S INTERPRETATION OF SECTION 2244(D) NEGATES THE PLAIN LANGUAGE OF THE STATUTE AND SUBVERTS CONGRESS'S INTENT IN PASSING THE STATUTE OF LIMITATIONS.

In his brief, respondent Bennett does not dispute many of the state's contentions. He does not dispute that the purpose of the tolling provision is to allow for exhaustion of state remedies, or that state petitions that are procedurally barred and cannot be adjudicated on the merits do nothing to advance exhaustion. Similarly, respondent does not dispute that giving effect to state procedural bars would advance principles of comity and federalism that pervade habeas corpus jurisprudence and were at the core of Congress's concerns in enacting AEDPA. And, perhaps most significantly, he does not dispute the fact that, although Congress sought to end what it perceived to be intolerable delays, particularly in death penalty cases, his interpretation would provide capital and non-capital prisoners alike with a simple expedient to perpetuate those delays. Respondent, nonetheless, raises four arguments in support of affirmance. None of these possesses any merit.

A. Respondent's Interpretation Negates the Plain Language of the Tolling Provision.

Respondent contends that a state post-conviction petition that is filed in a court that cannot determine the merits of the petition due to the state's procedural rules may still be "properly filed" in that court for purposes of the tolling provision. He argues that the wording of the statute mandates this result and that the plain language of the provision is so clear and unambiguous that any examination of the purposes of the statute of limitations, or even of the tolling provision that he invokes, is prohibited. But respondent's definition of the statutory language is flawed for many reasons, and his attempt

to preclude the court from examining the purposes of the statutory provision must fail.

First, respondent's plain language interpretation is flawed because it fails to give effect to all the words of the tolling provision. Respondent advocates a rule that a state post-conviction application is "properly filed" when a defendant has "satisf[ied] the prerequisites that must be met before a state court will allow the application to be filed." Resp. Bf. at 13. But any application that has been accepted for filing has, of course, "satisf[ied] the prerequisites that must be met before a state court will allow the application to be filed." This formulation, while simple enough on its face, fails to indicate how "properly filed" is distinct from just "filed." The failure to ascribe any separate meaning to the word "properly" is a "critical misstep," in the words of this Court, that establishes that his interpretation cannot be correct. *See Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000).

Second, respondent's rule calls into question Congress's use of the word "filed" in many other places in AEDPA where Congress used that term alone to mean what respondent defines as "properly filed." Thus, when Congress referred to "proceedings filed under section 2254" (§2262(a)), and to applications "filed" in federal court (§§2244(b)(3)(D), 2266(b)(1)(a), 2266(c)(1)), it obviously assumed that those applications had been filed in compliance with the rules necessary to permit the filing to occur. *See also* §2246 (referring to respondent's right to "file answering affidavits").

And when Congress – in enacting the most closely analogous provision of AEDPA, the statute of limitations under the "opt-in" provisions for capital cases – referred to the filing of motions for an extension of time (§2263(b)(3)), or the filing of petitions for certiorari (§2263(b)(1), §2262(a)), it undoubtedly meant documents that complied with the

prerequisites that were necessary for the document to be accepted for filing. Most significantly, when Congress used the word "filed," without the modifier "properly," in the parallel tolling provision under AEDPA's "opt-in" statute of limitations to suspend the limitations period during the pendency of a first state post-conviction application, there too it necessarily assumed that the documents complied with the rudimentary prerequisites necessary to allow filing in the first place.

Indeed, had Congress intended to permit tolling for any document that complied with the prerequisites for filing, it could have simply used the word "filed," as it did in allowing tolling for the first post-conviction application under the "opt-in" statute of limitations. The fact that it declined to do so is evidence that Congress meant to accomplish more by "properly filed" than what it could have accomplished by simply using "filed."

Moreover, Congress could, in fact, have accomplished the purpose that respondent ascribes to "properly filed" without using that phrase at all. It could simply have permitted tolling for the "time during which [an] . . . application for post-conviction review . . . is pending." Because an application that is "pending" must have been "filed," this language would have sufficed to allow tolling for all state post-conviction applications that had complied with sufficient prerequisites to allow filing. But Congress, instead, specifically added the qualifying language that the prisoner's petition be "properly filed" in state court, and, of course, must be presumed to have done so for a reason.

Third, contrary to respondent's suggestion, his rule cannot be easily applied and raises as many questions as it answers. Respondent acknowledges that his rule requires a determination of whether the "correct document" is delivered to the "designated authority" at the "right time." Resp. Bf. at 17. But the rule provides no guidance whatsoever on what

constitutes the "correct document," who performs the review to make that determination, how the determination is made, or whether the determination is in any way related to pre-existing habeas doctrine or case law. Indeed, while the question of what constitutes the correct document is indeed the key inquiry, respondent, by using the term without any further explanation, simply assumes a known answer when there is none.

Similarly, respondent provides little guidance on what constitutes a "designated authority." By this reference, he presumably means the "appropriate court," as several decisions to which he cites have held. *See* Resp. Bf. at 18. But this formulation fails to explain which court is the appropriate one or, again, who is to make that determination and whether it should be done by referring to habeas doctrine or the purposes of the statute. Indeed, respondent's rule cannot by itself answer even the most basic inquiries, such as whether a document has been delivered to the appropriate court if the court receiving the document has no jurisdiction to review the claim, if the proceeding in question does not "lie" in that court, or if statutory law simply precludes its adjudication on the merits.[1]

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[1] Respondent's reference to the "right time" is also far from self-explanatory, particularly given the interpretation he eventually places on it. Respondent appears to conclude that a petition is filed at the "right time" even if it is filed outside the expiration of a set statutory time limit so long as the statute setting the limit contains an "exception." *See* Resp. Bf. 38-39; *see also Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Indeed, such a belated petition is filed at the "right time" even though the state prisoner has concededly filed outside the expiration of the period and has made no attempt whatsoever to invoke the statutory exception. Moreover, if the language in the statute requires interpretation, such as with regard to when the clock begins to run, then the state time-bar would be given no effect. Respondent does not indicate how "properly filed" or his conclusory "right time" formulation mandates these distinctions.

Nor is it true, as respondent seems to suggest, that simple reference to the states' rules is sufficient to resolve the many questions raised by respondent's own formulation. The New York rules cited by respondent do not come close to answering these queries. *See* Resp. Bf. at 17, 23-24. Section 304 of the New York Civil Practice Law and Rules does not answer whether the "correct document" has been delivered or what is the appropriate court or clerk for the filing of a particular document. Moreover, the statute demands the "delivery of a summons with notice, summons and complaint, notice of petition, or order to show cause," something that criminal defendants are simply not required to do in filing an ordinary post-conviction application. Thus, if anything, this rule affirmatively misleads state prisoners. Similarly, section 202.5 of the Uniform Rules for the New York State Trial Courts and the County Court cases from 1932 and 1898, to which respondent cites, say nothing about the nature of the "papers" to which they refer or what is the "appropriate courtroom" or the "official" in question.

These references neither answer the questions that must be answered, according to respondent's own interpretation, nor are "clear," "eas[y] of application," or "accessible and understandable to all litigants," as respondent asserts. Resp. Bf. at 19. There is, indeed, simply no method to decide these issues under respondent's formulation except on an ad hoc basis, because respondent refuses to link his definition to the purposes of the statute. These ad hoc decisions, untethered to any guiding principle, would simply spawn new litigation and create a new area of law concerning the application of "properly filed" in its many varied contexts. By contrast, all of these questions can be answered with relative ease if the statutory purpose of exhaustion is used for guidance. Petitions that advance exhaustion toll the statute, those that cannot advance exhaustion because they cannot be adjudicated on the merits do not.

Simple reference to established doctrines can resolve the relevant questions in virtually all cases.

Nor does respondent's reference to the word "application" resolve the unanswered questions that respondent's formulation identifies. The term sheds no light whatsoever on what the "correct document" is in a given case, who makes that determination, or how it is made. Nor does it provide any guidance concerning whether the document has been filed in the appropriate court. Moreover, while respondent insists that "application" clarifies the statute and he faults the state for failing to distinguish "application" from "claim," neither Congress in enacting AEDPA nor this Court in its opinions has been nearly as uniform in its usage as respondent asserts. Indeed, in the very same sentence in which "application" appears, Congress makes a non-specific reference to the "pertinent . . . claim" without stating how it relates to the "application." Furthermore, in the immediately preceding provision, Congress refers to the timeliness of the "application," but then lists several dates of commencement of the limitations period that are claim-specific, such as the date on which the factual basis for "the claim or claims" could have been discovered and the date on which the constitutional right asserted was initially recognized by this Court. *See* 28 U.S.C. sec. 2244(d)(1). And this Court has frequently used the word filed in connection with "claim" rather than with "application," although respondent insists that the clear definition of these two terms demands otherwise. *See McCleskey v. Zant*, 499 U.S. 467, 500 (1991) (petitioner "filed the *Massiah* claim"); *Davis v. Wainwright*, 478 U.S. 1044, 1045 (1986) (petitioner's "claim should have been filed in a Florida trial court . . . ."); *see also Lindh v. Murphy*, 521 U.S. 320, 340 (1997) (Rehnquist, C.J., dissenting) ("habeas claims must be filed first in state courts . . ."). Thus, the word "application" is insufficient by itself to supply answers to the many questions that respondent's definition of "properly filed" raises about those terms.

Moreover, contrary to respondent's contention, an application cannot be so easily separated from the claims in it. Even using respondent's interpretation of "properly filed," reference to the nature of the allegations and claims in the application is necessary to determine if the "correct document" has been filed in the "appropriate court."[2] The question is not whether such a review will occur, but rather which procedural rules will be used when the review takes place and whether the method of choosing those rules is faithful to the purposes of the tolling provision.

Thus, respondent's attempt at a plain-language analysis does not bring him or the Court any closer to an understanding of Congress's intent in using the term "properly filed." Moreover, his analysis does not support his conclusion that Congress intended that a state post-conviction petition that is filed in a court that cannot, under state law, hear or adjudicate the merits of any of his claims would be "properly filed" in that court.

Indeed, the statutory language and objectives compel the opposite conclusion. First, the language of the statute requires something more than mere filing, and respondent himself concedes that this added inquiry requires an examination of both the document itself and whether the document is filed in the "appropriate court." But a procedurally barred application that is filed in a court that cannot adjudicate the merits of the claims

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[2] For example, in New York, under decisional law, the only remaining usage of the writ of *coram nobis* is to raise a claim of ineffective appellate counsel in an intermediate appellate court, and a *coram nobis* petition in that court is the only method of raising such a claim. *See People v. Bachert*, 69 N.Y.2d 593, 516 N.Y.S.2d 623 (1987). But it is impossible to determine if a particular delivered document complies with this rule without examining the claim raised, as well as the court in which the document is filed.

and cannot grant relief to the defendant cannot be deemed to be filed in the "appropriate court."

As an example, New York, like many states, precludes a trial court from considering a claim that was previously decided on appeal for the obvious reason that a trial court cannot logically have the power to overrule an appellate court. *See* N.Y.C.P.L. §440.10(2)(a). A trial court, then, has no power to adjudicate the merits of a such a contention; the only court that could do so would be the appellate court in a motion to reargue, subject to that court's rules. A petition that attempts to raise such a claim in the trial court has, very simply, addressed his claim to the wrong court: a court that does not have the power to grant him the relief that he seeks.

Second, the only interpretation of "properly filed" that is consistent with the statutory scheme and objectives is one that gives full effect to state procedural rules. Such an interpretation advances the purpose of the tolling provision to allow for exhaustion of state remedies but does not countenance delays from repetitious, procedurally barred motions. *See infra* at 8-12; Pet. Bf. at 22-25.

Finally, respondent's attempt to preclude the court from considering the statutory objectives falls under the weight of respondent's own arguments. His claim that the plain language of the statute is so clear and unambiguous that resort to any inquiry beyond the statute is prohibited is belied by, if nothing else, his need to resort to such vague terms as "correct document" and "appropriate court." And the fact that his own definition renders meaningless at least one key word of the statute and is inconsistent with Congress's usage of the word "filed" elsewhere is still more evidence that reference to the statutory objectives cannot be avoided. Indeed, it is only by keeping in mind the purpose of the tolling provision that this

Court can provide content to the terms of the statute and the terms that respondent himself uses.

B. Respondent's Interpretation Frustrates the Objectives of the Statutory Limitations Period Without Advancing Any Purpose of the Tolling Provision.

Respondent argues that there is no reason to fear that capital prisoners will in fact delay under the statute, despite being given the opportunity to do so, and he similarly assures the court that non-capital prisoners have no incentive to delay and that there is thus no reason to believe that they will engage in such delay through repetitious litigation. Resp. Bf. at 17. These arguments need not long detain the Court.

Both this Court and Congress have recognized that capital prisoners have the greatest possible incentive to delay, and that most of these prisoners will use every means available to attempt to slow the process and frustrate the imposition of sentence. This Court has expressly observed that habeas petitioners frequently "delay their filings until the last minute" with a view to obtaining a stay, *see Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992), and has voiced concern that the procedures it has created have been used manipulatively in obvious attempts to delay executions indefinitely. *See Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Gomez v. District Court*, 503 U.S. 653, 653-54 (1992). Congress too has recognized capital prisoners' undeniable incentive to delay and their limitless efforts to achieve that delay; indeed, it was these manipulative attempts that caused Congress to impose the statute of limitations in the first place. *See* 141 Cong. Rec. S 7822 (1995) (Sen. Nickles) (capital prisoners "fully exploit[] the system's potential for obstruction" and maximize delay); 141 Cong. Rec. S 7807 (1995) (Sen. Hatch) ("Abuse of the habeas process features strongly in the extraordinary delay between sentence and the carrying out of that sentence."); *see also* Report of the

Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States, at 5 (1989). Congress in fact felt that by filing repetitive petitions, "criminals are able to delay the imposition of sentence indefinitely," resulting in "de facto nullification" of capital punishment. 141 Cong. Rec. S 7822, 7823 (1995) (Sen. Nickles).

Despite this, respondent now asserts that there is no evidence that capital prisoners in fact delay and that the court need not fear that capital prisoners will act to defeat the statute. In essence, he simply asserts that the very premise of the statute is incorrect, and that the court need not be concerned with it. But respondent cannot assume away the very reason that capital defendants were subjected to the statute of limitations in the first place, and his self-serving attempts to reassure the Court simply cannot command greater authority than Congress's concerns. Indeed, the only way to ensure that the statute has an effect in capital cases is to deny capital defendants the readily available tool for delay that respondent's interpretation of the tolling provision would provide.

Respondent, however, argues that there are ample other means available to the states of limiting delay in capital cases, such as simply setting an execution date. Resp. Bf. at 17. But these methods of limiting delay have always existed, yet they were wholly insufficient to contain the rampant delays that Congress was so concerned about. Indeed, Congress felt the need to impose a limitations period despite the existence of these alternative methods of controlling delays, and obviously intended the statute to have some effect beyond what these controls could accomplish.

Respondent similarly errs in his efforts to assure the Court that it should not be concerned with delays by non-capital prisoners, who, he argues, have no incentive to delay. Here again, there is no question that Congress was concerned about

delay by non-capital prisoners as well as capital prisoners, and the alleged lack of incentive to delay on the part of non-capital prisoners did not prevent Congress from imposing a statute of limitations that included them. Moreover, there is strong empirical evidence, cited in the state's main brief and not refuted by respondent, that state prisoners do cause delay by filing repetitious state motions. *See* Pet. Bf. at 37. Indeed, the evidence suggests that fifty percent of all state post-conviction petitions represents the prisoner's third or subsequent petition, and that a third of all such petitions represents the prisoner's fourth or subsequent petition. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts*, National Center for State Courts, at 37 (1994). And even a cursory review of cases in which the question of tolling has arisen reveals that repetitive state petitions are common and cause substantial periods of delay that serve no purpose.[3] Thus, whatever the motivation of non-capital prisoners, the fact is that they frequently file repetitious procedurally barred applications in state court that cause years of delay and serve no purpose under the statute. Under respondent's interpretation, these repetitious applications would pointlessly extend the limitation period for years.

Moreover, the problem of delay due to repetitious filings by non-capital prisoners cannot be controlled, as defendant suggests, by individual sanctions for abusive filers. To the contrary, the extent of the problem goes far beyond such remedies, which are imposed on a case-by-case basis and usually reserved only for the most vexatious litigants. These

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[3] *See Childs v. Zavaras*, 2000 U.S. App. LEXIS 2685 (10th Cir. 2000) (third state post-conviction motion); *Smith v. Johnson*, 216 F.3d 521 (5th Cir. 2000) (third state habeas petition); *Weekly v. Moore*, 204 F.3d 1083 (11th Cir. 2000) (third state motion filed); *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000) (three state post-conviction motions and one state habeas); *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999) (fourth personal restraint petition); *Hughes v. Irvin*, 967 F.Supp. 775 (E.D.N.Y. 1997) (seventh out of ten post-conviction applications at issue).

measures cannot effectively address one-half or more of all state post-conviction applications.

In the end, respondent does little more than assure the Court that Congress's concerns in enacting the statute were unfounded or exaggerated. This Court should not adopt an approach that denies the very reason for Congress's enactment of a statute of limitations.

C. The State's Rule Employs Pre-existing Habeas Doctrine, Which Provides Ample Guidance on How the Rule Is To Be Administered.

Respondent argues that a rule that precludes tolling for state petitions that cannot be adjudicated on the merits is unworkable and would lead to "chaos" because it would raise too many unanswered questions and would require the creation of a new body of law. Resp. Bf. at 32-37. This is simply incorrect. The rule relies on well-established habeas corpus doctrines of procedural default to provide guidance to courts applying it, and, indeed, federal courts can readily rely on their own precedent with regard to specific state procedural rules to assist in the determination. Respondent fails to explain how "chaos" will result from a rule that simply adopts a doctrine that has been in operation for so many years.

Under the rule espoused by the state, a federal court need only apply its own procedural default precedent in order to determine whether a claim is procedurally barred or can be adjudicated on the merits in state court. Indeed, federal courts determine on a daily basis whether a claim raised in a federal petition that has not been raised in state court should be returned to state court for exhaustion purposes or whether the claim is procedurally barred under state law. Federal courts in New York make precisely this determination all the time, with regard to the very procedural rules at issue in this case, as many

Second Circuit and District Court cases demonstrate.[4] Because federal courts in fact easily make these procedural determinations even without a prior state-court ruling on the procedural question, they could also undoubtedly do so after a state court has decided the application. Indeed, in the ordinary case, the federal courts will have readily available to them a state-court determination eliminating any doubt as to the application of the state bar; all the federal court need do is give deference to that determination.

Respondent nevertheless appears to argue that the state's rule is unworkable because its formulation is overly generous to petitioners. He cites language in the state's brief that a state prisoner who "arguably" invokes an exception to the state rule of procedure would probably not be precluded from tolling, and he argues that all petitioners "arguably" invoke such exceptions. Resp. Bf. at 33-34. There are many answers to these assertions. First, the state's use of the term arguably, taken in context, is not a description of the standard to be used, as respondent suggests; it is merely a conclusion as to the actual

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[4] *See, e.g., Strogov v. Attorney General*, 191 F.3d 188, 193-94 (2d Cir. 1998); *Jackson v. Leonardo*, 162 F.3d 81, 84 and n.7 (2d Cir. 1998); *Reyes v. Keane*, 118 F.3d 136, 139-40 (2d Cir.1997); *Caballero v. Keane*, 42 F.3d 738, 740-41 (2d Cir. 1994); *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994); *Washington v. James*, 996 F.2d 1442, 1446-47 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991); *Johnson v. State of New York*, 974 F.Supp. 185, 188 n. 1 (E.D.N.Y. 1997); *Mabrey v. Keane*, 939 F.Supp. 193, 199 n.5 (E.D.N.Y. 1996); *Moates v. Walker*, 929 F.Supp. 82, 86 (E.D.N.Y. 1996); *Ball v. Senkowski*, 906 F. Supp. 99, 102 (N.D.N.Y. 1995); *Meachem v. Keane*, 899 F.Supp. 1130, 1138 (S.D.N.Y. 1995); *Perfetto v. Hoke*, 898 F.Supp. 105, 110-11 (E.D.N.Y. 1995); *Meatley v. Artuz*, 886 F.Supp. 1009, 1013 (E.D.N.Y. 1995); *Bacchi v. Senkowski*, 884 F.Supp. 724, 731 (E.D.N.Y. 1995), *aff'd*, 100 F.3d 603 (2d Cir.), *cert. denied*, 519 U.S. 894 (1996); *Bentley v. Scully*, 851 F.Supp. 586, 603 (S.D.N.Y. 1994), *vacated on other grounds*, 41 F.3d 818 (2d Cir. 1994), *cert. denied*, 516 U.S. 1152 (1996); *Holmes v. Bartlett*, 810 F.Supp. 550, 555-56 (S.D.N.Y. 1993).

effect of the rule. As the state's main brief makes clear, federal courts will decide the tolling issue by making precisely the same determination that they would make if they were deciding to return the case to the state courts for exhaustion purposes or deem the matter procedurally barred under a state rule. Federal courts make these determinations every day, and the rule stated is thus not "unworkable."[5]

Second, it is simply not true that most petitioners invoke, much less legitimately invoke, exceptions to state procedural rules. Indeed, with regard to the very state rule at issue in this case, federal courts in New York have routinely held that petitioner's claims would be procedurally barred without the need to discuss the invocation of any exception. This is true of almost all reported Second Circuit and New York District Court cases dealing with the rule at issue in this case.

Third, the rule is not unworkable simply because in some cases the federal courts may have to determine the applicability of an exception. This Court, in fact, dealt with just such a

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[5] Indeed, four of respondent's ten enumerated questions revolve around the use in the state's brief of the word "arguably" and its companion word "colorably," neither of which purports to state any standard of review. Three questions relate to whether tolling should occur on a claim-by-claim basis, but there has never even been any suggestion by the state that tolling need occur in this manner and thus these too need not concern the Court. One question relates to the use of the word "mandatory" in the state's brief, which was simply intended to distinguish between New York's post-conviction procedural rules that are wholly discretionary, *see* N.Y.C.P.L. § 440.10(3), and its non-discretionary bars, such as the ones that apply in this case, *see* §440.10(2). And, finally, respondent's question concerning the need for a cause-and-prejudice rule is obviated by Congress's inclusion in the statute of limitations of several provisions delaying commencement of the one-year period where a petitioner would otherwise have cause, such as when an external impediment to filing exists, there is a retroactively effective change in the law, or the factual basis of the petitioner's claim could not have been discovered earlier. *See* §2244(d)(1)(B),(C), and (D).

situation in *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). There, the Court considered an Illinois procedural rule that precluded re-litigation of claims that were or could have been raised on direct appeal. The rule, however, contained an exception for claims of fundamental unfairness. The Court held that, although the petitioner's equal protection claim had not been raised in state court, it was procedurally barred under state law and would not be returned to state court for exhaustion purposes. The Court specifically held that the fundamental fairness exception did not apply to petitioner's equal protection claim under state law, based on pre-existing state precedent. *See also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Thus, as experience has demonstrated, the exceptions to state procedural rules are not so elusive as a practical matter as to have made the procedural default doctrine unworkable.

Fourth, this Court need not, of course, be so lenient to petitioners as to adopt the state's rule in toto; it could, instead, simply accept a prior state-court determination on a procedural rule as the final word, as have some federal courts, *see Freeman v. Page*, 208 F.3d 572, 576-77 (7th Cir. 2000); *Webster v. Moore*, 199 F. 3d 1256, 1259 (11th Cir. 2000), and make no express provision for those petitioners who legitimately believe that they are exhausting state remedies in state court. Or, it could simply rely on principles of equitable tolling to handle such situations. *See Smith v. McGinniss*, 208 F.3d 13 (2d Cir. 2000) (collecting cases). These approaches too provide viable alternatives that give effect to state procedural rules and prevent capital prisoners from defeating the statute and non-capital prisoners from benefiting from pointless motions that do not advance the purposes of exhaustion.

Respondent also advances two arguments that the state addresses in its main brief. He argues that the rule places an unreasonable burden on petitioners and that petitioners will accordingly flock to federal court, overburdening the system.

Resp. Bf. at 12-13, 34. But petitioners are already charged with knowledge of state procedural rules under the procedural default doctrine. *See McCleskey v. Zant*, 499 U.S. at 493 (procedural default and abuse of the writ doctrines "impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones"). The rule here requires no more. *See* Pet. Bf. at 32. Moreover, there is no evidence of mass, premature flight to federal court in those circuits in which tolling is disallowed for state petitions that are procedurally barred. Nor is there any indication that the established procedures for dismissing petitions with unexhausted claims have become so unworkable as to be inadequate to handle the problem, should one arise.

In short, respondent's arguments that the state's rule is unworkable simply ignore the fact that the rule adopts well-established doctrines that have been routinely applied in the federal courts. Thus, his grave predictions are unfounded.

D. Respondent's Second Post-Conviction Motion Was Procedurally Barred in State Court.

Respondent now argues that his second post-conviction 440 motion was not in fact procedurally barred in state court. He contends that because the procedural rules prohibiting review of his claims contained exceptions or other qualifying language, his claims were not mandatorily barred and he should be afforded tolling, even though he never invoked the statutory exceptions at issue. In so arguing, however, respondent asks this Court to adopt a new and quite unprecedented habeas rule that denies respect for state procedural statutes if they contain any exception whatsoever, as broadly defined by respondent. The Court should decline to create this new distinction.

Under section 440.10(2)(a) of the New York Criminal Procedure Law, a court "must" dismiss a claim that was previously decided on the merits on direct appeal. Respondent points out that that section contains an exception for claims that rely on "a retroactively effective change in the law." He does not dispute that his first claim in the 440 motion was previously decided on the merits; nor did he invoke the exception in his 440 motion, or make any attempt to show even now that there was a retroactively effective change in the law from which he could have benefited. According to respondent, because of the mere existence of this uninvoked exception, the procedural bar is not mandatory.

Respondent essentially repeats this argument as to the other mandatory bar applicable to his 440 motion, section 440.10(2)(c). Under that provision, a court "must" dismiss a claim that could have been raised on direct appeal but was not, such as respondent's second and third claims in his 440 motion. Respondent observes that this statute contains language that the failure to raise the claim must be unjustifiable and that the record on direct appeal must have been "adequate." Here again, respondent does not contend that he argued in his 440 motion that his failure was justifiable or that the record on direct appeal was not adequate to raise his claims; nor does he make those arguments now. According to respondent, his claims are not mandatorily barred from review because of the mere existence of these uninvoked exceptions.

But the distinction respondent creates is entirely new to this Court's habeas corpus jurisprudence and would violate fundamental principles of comity and federalism by denying respect for the vast majority of state procedural rules. No such distinction is made under the doctrine of procedural default, and as this Court's decision in *Teague v. Lane* establishes, the mere existence of an exception to a state procedural rule, even an exception as broad as "fundamental unfairness," does not

preclude a federal court from applying it, even without a prior adjudication in state court on the issue. *See Teague*, 489 U.S. at 297-99. Moreover, most state rules contain either some exception, or at the least some qualifying language the existence of which would operate to deny the rule respect under the tolling provision. This would not only disserve core principles of comity and federalism that AEDPA sought to advance, *see Williams v. Taylor*, 120 S.Ct. at 1490, it would allow prisoners in almost all states to file repetitive applications and defeat the statute of limitations at will.

Furthermore, respondent fails to address why this Court would need a state-court decision to conclude that his claims are procedurally barred when he does not currently dispute that the facts required under the statute for application of the bars have been established. Indeed, he makes no argument or showing that the procedural bars were inapplicable other than to point to exceptions that he never previously invoked and still does not rely on. This extraordinary fact alone should preclude respondent from asserting that the procedural bar is inapplicable. Regardless of whether an explicit state-court decision applying the procedural bar should be required in the ordinary case, respondent's concessions here obviate the need for one.

Additionally, the mere fact that the state made alternative procedural and even merits arguments does not deprive the procedural bar of its effect. Just as a state court need not fear, under the procedural default doctrine, treating the merits in the alternative, *see Harris v. Reed*, 489 U.S. 255 (1989), a representative of the state does not deprive an otherwise applicable procedural rule of its effect simply by making an alternative argument. This is particularly true in this case, where respondent makes no argument that the procedural bar was inapplicable, other than to identify uninvoked exceptions.

Nor does the fact that respondent made a passing reference in his motion to his belief that he was exhausting state remedies save his clearly barred petition. Petitioner's subjective view cannot control the application of the tolling provision. Indeed, if it could, petitioners could routinely avoid the tolling provision simply by placing such a statement of good faith in their state-court applications. Similarly, contrary to respondent's contention (Resp. Bf. at 38 n.18), this subjective belief does not, by itself, constitute a legitimate attempt or even "arguably" legitimate attempt to exhaust state remedies, given that his claim is clearly procedurally barred, as respondent has effectively conceded.

In short, even under respondent's own formulation, he failed to file the "correct document" in the "appropriate court" or, for that matter, at the "right time." He filed a motion for post-conviction relief in the trial court when the only court that could hear or adjudicate his claims on the merits was the Appellate Division on direct review in 1986, and he filed his motion years after that court's review was completed. This motion did nothing to advance the purpose of the tolling provision to allow for exhaustion, and served no purpose other than delay.

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In the end, respondent's interpretation of the tolling provision is untenable, primarily because it is divorced from the statute's purposes. His attempts to define the statutory language rely on meaningless terms, which can only be given content by reference to the statutory aims. Moreover, his overly simplistic interpretation allows tolling for repetitious state petitions that cannot advance any purpose of the statute but instead actively undermine it. And, perhaps most important, respondent's interpretation provides capital prisoners with a

simple expedient to defeat the statute and perpetuate the very delays that caused Congress to pass the statute in the first place.

Respectfully submitted,

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